Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

Linh Dao, Quynh Dao, Luyen Daotien, Nguyen Daotien, Tam Daotien, *Petitioners.*

v.

Washington Township Healthcare District, Ahmed Sadiq, M.D., David Cheng, M.D., Does 1 through 100, *Respondents.*

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Four

---

PETITION FOR A WRIT OF CERTIORARI

Linh Dao, Quynh Dao, Luyen Daotien, Nguyen Daotien, Tam Daotien,
Petitioners in propria persona
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QUESTION PRESENTED

Whether, consistent with the Fourteenth Amendment, a *de facto* primary healthcare provider, an active member of a patient's healthcare team who has demonstrated and disclosed ample knowledge of the subject to entitle her opinion to go to the jury, may be excluded from giving expert testimony when current law readily allows such testimony from those who treat the patient.

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The California Court of Appeal issued its unpublished opinion in this case on June 23, 2006, [2006 Cal. App. Unpub. LEXIS 5398]. A copy of that opinion is attached as Appendix A. Petition for Rehearing in the Court of Appeal was denied on July 24, 2006. Appendix B is a copy of the decision of the trial court that was the subject of the Court of Appeal's review.

JURISDICTION

The California Supreme Court denied discretionary review on September 13, 2006. This Court has jurisdiction under 28 U.S.C. 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "no state shall… deny to any person within its jurisdiction the

equal protection of the laws."

STATEMENT OF THE CASE

A. Factual Background

This is a medical malpractice related case of abuse and neglect that resulted in the death of a mother and wife, petitioners' decedent, Hieu Vu (Vu) on September 19, 2001.

Vu was diagnosed at age 59, in December 1994 with Myelodysplastic Syndrome (MDS), an indolent blood disorder that required periodic packed red cell transfusions. The only known cure for MDS was a bone marrow or peripheral stem cell transplant.

With periodic red cell transfusions, iron, a part of hemoglobin, gets accumulated in transfusional patients' body over time, and needs to be chelated by the drug Desferal.

Dr. Ahmed Sadiq was Vu's primary care physician and hematologist from early 1995 to the end of June 2000 when he

abandoned her. Sadiq had neglected to chelate Vu's physiologically excessive iron with Desferal, and thereby caused her to have a secondary medical condition, iron overload, which in turn affected her body systemically, reaching critical stage at one point.

Linh Dao, a trained bio, bio-medical engineer, Vu's daughter and primary care giver was finally able to secure a Desferal prescription for Vu in April, 2000.

Dr. Peter Greenberg, Vu's treating hematologist at Stanford University referred her to the Stanford transplant program for a non-myeloablative peripheral stem cell transplant. Her transplant physician, Dr. Laura Johnston decided to hold it off since Vu was in no hematological distress, and Dr. Johnston would like to see her recover from her significant iron overload first. Vu had two perfect sibling matches.

Dr. David Cheng (Cheng) was Vu's primary care physician and hematologist from July 2000 to the day she died.

Thanks to Desferal, Vu's overall

condition was steadily improving. For example, her heart murmur, detected in December 1999 during a 2nd opinion consultation with Dr. Jeffrey Wolfe, a hematologist, and caused by excessive iron deposits in her mitral valve that prevented it from closing properly, was gone by April, 2001. Indeed, her medical conditions improved well enough that Dr. Byron Wilson, a consulting hematologist, recommended in this same April, 2001 report that transplant time be moved up.

Early September, 2001, as she was waiting to recover from iron overload, Vu was admitted to Washington Hospital (Washington) for sepsis, a blood infection. Iron overload makes people more susceptible to infections. All clinical indications showed that she had recovered from it, and was therefore moved from the emergency room to a regular hospital floor. She then developed a nosocomial urinary tract infection from the Foley catheter. She was not treated for this infection, and died from it.

B. Proceedings Below

In addition to the various causes of action, Petitioners sued for Negligent Infliction of Emotional Distress and Wrongful Death. This last cause of action survived all demurrers, but was eventually dismissed on Summary Judgment, at the last minute, right before cut-off time for such motion to be brought before trial. (The trial date was never changed.) Each Respondent supported its motion with a single expert witness' declaration that was based on the medical records alone.

Respondent Sadiq submitted a declaration from a hired gun, hematologist Jeanna Welborn, which petitioners specifically objected to being hearsay in its entirety. The Court of Appeal however deemed that petitioners specifically should have objected to it not being done under penalty of perjury. Pet. App. A9.

The Fifth Amended Complaint (FAC), which framed the issues that were attacked by the Summary Judgment, had alleged, in

addition to the relevant facts listed in the section A above, that Linh Dao, as the lead caregiver to Vu was a member of her healthcare team, and had at times given medical orders, performed functions of a primary care physician, and at one time, for example, even performed minor surgery to drain a wound on Vu's hand and put antibiotics in it because Sadiq had refused to care for the wound letting plasma oozing out of it for months.

Welborn's declaration directly attacked Linh Dao, citing her by name and listed the actions she had taken as "attempt to direct her mother's ongoing care".

In another attack, she cited " ...in November 2000, the patient refused platelet transfusions but accepted red blood cells ...), a clear reference to a standard of care Vu had chosen at the advice of Linh Dao, a standard of care approved and explained by Dr. Wilson in the report mentioned in the "Factual Background" above: "I agree with the patient and her daughter that platelets should be

given on a p.r.n. (as needed) basis for bleeding only as multiple platelet transfusions increase the risk for transplant complication later on..."

All in all, the respondents had coordinated their declarations with Welborn claiming Vu died of an infection, but was not specific as to what type of infection it was. Cheng's expert witness however could not even admit to Vu having iron overload, claimed her MDS had progressed instead. And Washington's expert, nurse Cadet, only said she reviewed the medical records which reflected that Washington's nurses only followed doctors' orders.

When petitioners illustrated a fact which contradicted Cadet's claim she reviewed the medical records, the Court of Appeal ruled in the last paragraph of its opinion that petitioners could not show that Cadet did not review the medical records because one needs to be an expert to review the medical records. Not only did the Court of Appeal gut Petitioners' Opposition to the

Summary Judgment Motions by excluding Linh Dao's declaration, it also dismissed all the things we pointed out as disputes of material facts as percipients' witnesses.

Petitioners note that the facts cited above came almost exclusively from the medical records offered into evidence by the Respondents themselves.

REASONS FOR GRANTING THE WRIT

As Petitioners pointed out to the California Supreme Court, given the state of our healthcare system, knowledgeable caregivers and patient advocates play an important role in the care of patients, and need to be recognized by the courts. All the facts and procedures we listed above are in the records, on file with the California Court of Appeal. Here, for example, a practicing hematologist, Dr. Byron Wilson, already concurred with Linh Dao on hematology standard of care, as well as standard of care in the preparation for a transplant so as to avoid

complications in post- non-myeloablative peripheral stem cell transplant [I agree with the patient and her daughter that platelets should be given on a p.r.n. (as needed) basis for bleeding only as multiple platelet transfusions increase the risk for transplant complication later on. (Appellant's Appendix 455)]. Dr. Wilson also relied on Linh Dao for the needed medical information to treat Vu (AA 454-456):

" SOCIAL HISTORY: ....The patient lives with her daughter. Her daughter was in the room today and served as an important source of medical information."

As we noted above, Linh Dao was attacked for a medical decision taken, yet the Court of Appeal refused to allow her the right to explain or opine as to why such standard of care was correct to defend herself.

Also, the Court of Appeal deemed Linh Dao was not qualified to review the medical records to glean any facts, yet it **determined** in the 1st paragraph of the 2nd page of its opinion the **fact** that "Dr. Wolfe

recommended a bone marrow aspirate with cytogenetics to assess the disease." **on its own** without the input from any of the respondents' expert witnesses.

Patient Advocates such as Linh Dao, are the *de facto* healthcare providers to the patients, and are often more knowledgeable about what is going on with the patients they care for than the patients' very own primary care physicians who most of the time are too busy to listen. They improve patients'care, limit waste and abuse, minimize medical errors and negligence, and help make healthcare delivery more efficient and less expensive. In effect, they help not only the patients, but also the doctors and nurses they interact with. Their expert testimony can help any of the parties involved since they are the people who are the most intimate with medical facts and standard of care as a results of those facts. In this case we have a percipient witness who could provide facts and opinions, the iron overload that has improved (this fact and opinion would help

Sadiq), how Vu was urinary tract became infected and whether she was in the condition to be able to receive treatment for the urinary tract infection. All these facts and opinions jived with what was already in the medical records provided by none other than the Respondents themselves.

Moreover, as petitioners pointed out to both the Court of Appeal and the California Supreme Court, the treating physicians, Drs. Peter Greenberg, Laura Johnston, Byron Wilson, and cardiologist David Berke, the epidemiologist and the treating nurses would already all be expert witnesses at trial, and would dispute the medical opinions and facts given by the respondents' experts. In *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 39, the California Supreme Court held: "For such a witness, no expert witness declaration is required, and he may testify as to any opinions formed on the basis of facts independently acquired and informed by his training, skill, and experience. This may well include opinions regarding causation and standard of care because such issues are

inherent in ...[their].... work."

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Linh Dao, Quynh Dao, LuyenDaotien,
Nguyen Daotien and Tam Daotien,
Petitioners in propria persona

Date: December 12, 2006

APPENDIX A

Court of Appeal, First Appellate District, Div. 4 – No. A110105

S145569

IN THE SUPREME COURT OF CALIFORNIA

En Banc

LINH DAO et al., Plaintiffs and Appellants,

v.

WASHINGTON TOWNSHIP HEALTHCARE DISTRICT et al., Defendants and Respondents.

Petition for Review DENIED

GEORGE

Chief Justice

Filed Sep 13, 2006
Frederick K. Oninch, Deputy Clerk

APPENDIX B

*2006 Cal. App. Unpub. LEXIS 5398, **

LINH DAO et al., Plaintiffs and Appellants, v. WASHINGTON TOWNSHIP HEALTH CARE DISTRICT et al., Defendants and Respondents.

A110105

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION 4

2006 Cal. App. Unpub. LEXIS 5398

June 23, 2006, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR

ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

PRIOR HISTORY: Alameda County Super. Ct. No. 2002065566.

JUDGES: Reardon, J.; Ruvolo, P.J., Rivera, J. concurred.

OPINION BY: Reardon

OPINION: Family members of decedent Hieu Vu (appellants) n1 appeal from the trial court's (1) sustaining of demurrers without leave to amend, and (2) entering summary judgments in favor of all respondents. We affirm.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - -
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n1 Appellants are Linh Dao, Quynh Dao, Luyen Daotien, Nguyen Daotien and Tam Daotien.

Respondents are Washington Township Health Care District (Washington Township), Ahmed Sadiq, M.D. and David Cheng, M.D.

- - - - - - - - - - - - End Footnotes- - - - - - - - -

I. BACKGROUND

A. *Hieu Vu's Illness and Death.*

The decedent, Hieu Vu, was diagnosed with myelodysplastic syndrome (MDS) in December 1994. She was 59 [*2] years old at the time. MDS is a preleukemic disease in which bone marrow stops making healthy blood cells and instead produces poorly functioning, immature blood cells.

Dr. Cheng was Vu's primary care physician and hematologist at the time. In March 1995 Vu began seeing Dr. Sadiq for her hematological care. The family sought a second opinion concerning possible therapies, consulting with Dr. Wolf at Alta Bates Medical Center in January 2000. Dr. Wolf recommended a bone marrow aspirate with cytogenetics to assess the disease. He also indicated Vu may have an underlying cardiac

problem which, in combination with her age, made her a poor candidate for allogeneic transplantation.

Vu returned to the care of Dr. Cheng in July 2000.
Vu was also evaluated on more than one occasion by physicians at Stanford University Medical Center. The assessment was that she was a poor candidate for transplantation.

In September 2001 Vu was admitted to Washington Hospital in Fremont. She had complaints of abdominal pain and fever. Vu died there on September 19, 2001. The certificate of death listed the cause of death as klebsiella septicemia due to pancytopenia due to MDS.

B. *Procedural History* [*3]
Washington Hospital is operated by Washington Township, a public entity. On March 18, 2002, appellants served a claim against Washington Township pursuant to Government Code section 910, alleging wrongful death. Washington Township

rejected the claim. Linh Dao, in pro. per., filed a complaint for damages in September 2002 against Washington Township, Dr. Cheng and Dr. Sadiq.

The second amended complaint (SAC), was filed August 6, 2003, with five family members as plaintiffs. The court sustained the demurrers of all defendants to the SAC without leave to amend as to the cause of action for negligent infliction of emotional distress, based on failure to plead facts that established a basis for liability for third party emotional distress damages. As to the causes of action for malpractice, intentional infliction of emotional distress, willful misconduct, elder abuse and survivorship, the court sustained Washington Township's demurrer without leave to amend on statute of limitations grounds. The court granted leave to amend various causes of action against the doctors.

With their fifth amended complaint, appellants added a cause of action against Drs. Cheng [*4] and Sadiq, plus additional

allegations. This time the court sustained the doctors' demurrers to all causes of action without leave to amend, except the cause of action for wrongful death. This cause was set for trial against all defendants. Each defendant moved successfully for summary judgment on the wrongful death cause. The court explained that "the law is quite clear in a medical malpractice case that when you have competent expert testimony on behalf of the defendants to establish [a] the absence of causation of injury, and [b] that each of the defendants met their appropriate standard of care, unless you have a qualified medical expert that disagrees in a declaration under penalty of perjury with the defense experts, I'm required to grant summary judgment." Appellants moved for reconsideration after judgment was entered. The court denied the motion for lack of jurisdiction. This appeal followed.

II. DISCUSSION

A. *The Trial Court Properly Sustained the Demurrers Without Leave to Amend.*

1. *Standard of Review*

We undertake de novo review of the trial court's sustaining of a demurrer without leave to amend, exercising independent judgment as to whether a cause [*5] of action has been stated. (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) All properly pleaded allegations are deemed admitted, but we do not assume the truth of contentions, conclusions of fact or law, or deductions. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

2. *Negligent Infliction of Emotional Distress Cause*

Appellants challenge the court's sustaining of respondents' demurrers to their negligent infliction of emotional distress claim. In the SAC appellants generally alleged that they were cognizant of decedent's symptoms and conditions; personally observed repeated negligence, improper care, and lack of care on the part of respondents; and repeatedly informed personnel of errors and omissions in the care of decedent, to no effect. Sustaining

the demurrer of each respondent to this cause, the trial court ruled that appellants failed to plead facts establishing a legal basis for liability for third party emotional distress damages.

We first note that as to Washington Township, the Government Code claim only gave the public entity notice of a wrongful death claim based on decedent's death. In [*6] California, each cause of action alleged in a complaint against a public entity must conform to the factual circumstances and theories set forth in the plaintiff's Government Code claim. If the plaintiff relies on more than one theory of recovery against the public entity, each cause must have been reflected in a timely claim. (*Turner v. State of California* (1991) 232 Cal. App. 3d 883, 888, 891, 284 Cal. Rptr. 349.) The Government Code claim did not allege negligent nursing care conduct provided by Washington Hospital staff *which appellants observed and which caused them emotional distress at the time of observance.* Therefore, appellants were precluded from stating such cause of

action against Washington Township.

As to the claims against Drs. Sadiq and Cheng, the obvious starting point is the fact that decedent, not appellants, was their patient. Where a plaintiff is not the defendant's patient and the emotional distress is derived solely from a reaction to the injury of another, there is no direct-victim cause of action. The existence of a professional relationship with another family member, such as a child or spouse, is not enough to support such a claim. [*7] (*Huggins v. Longs Drug Stores California, Inc.* (1993) 6 Cal.4th 124, 131-132.) Appellants did not have a professional relationship with Drs. Sadiq or Cheng. Therefore, they were not direct victims and could not state a "direct victim" emotional distress claim.

Nor could appellants establish a bystander emotional distress claim against Drs. Sadiq and Cheng. A plaintiff may recover emotional distress damages as a bystander observing the negligently inflicted injury of a third person only if the plaintiff " '(1) is closely related to

the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress-a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.' " (*Bird v. Saenz* (2002) 28 Cal.4th 910, 915, fns. omitted, quoting *Thing v. La Chusa* (1989) 48 Cal.3d 644, 667-668, 257 Cal. Rptr. 865.) Except in the most obvious cases, lay bystanders cannot meaningfully perceive the failure properly to diagnose and treat a [*8] patient because such failure is beyond their awareness. Thus a layperson's observation of medical procedures generally will not satisfy the requirement of contemporaneous awareness of the injury-producing event. (*Bird v. Saenz, supra,* at pp. 917-918.) Under *Bird v. Saenz*, appellants would have had to appreciate, at the time each physician treated the decedent, that their actions fell short of the standard of care for a physician treating a patient with MDS. Appellants could not and did not satisfy this

prong of bystander liability.

3. *Survival Claims*

In the SAC appellants asserted five new survival causes of action on behalf of decedent's estate. Sustaining Washington Township's demurrer to these causes, the trial court concluded that since the estate was not a plaintiff in the original or first amended complaints, the new causes did not relate back to the September 19, 2002 filing of the original wrongful death complaint and were untimely under Government Code section 945.6.

Appellants attack this ruling, noting that an allegation within the original complaint refers to decedent's personal representative. Without resolving the import [*9] of that phrase where the original complaint was for wrongful death by "LINH DAO, in propria persona and (on behalf of) The Heirs of Decedent HIEU VU," we note that no Government Code claim was ever presented on behalf of the estate. Rather, such claim was lodged by "claimant Linh Dao, on behalf

of herself, her father, Luyen Daotien, and her siblings . . . ."

"Compliance with [our] claims statutes is mandatory [citation]; and failure to file a claim is fatal to the cause of action. [Citation.]" (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 454, 115 Cal. Rptr. 797.) That Linh Dao filed a timely claim for her own wrongful cause does not excuse the absence of a decedent's claim. The purpose of the claims statutes "is to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation. [Citations.] It is well-settled that claims statutes must be satisfied even in face of the public entity's actual knowledge of the circumstances surrounding the claim." (*Id.* at p. 455.) An action for wrongful death is wholly distinct from a survival action [*10] by decedent's estate. Thus the filing of a government claim for one such action does not cure the failure to present a claim for the other. (*Lewis v. City and County of San Francisco* (1971) 21 Cal.

App. 3d 339, 340-341, 98 Cal. Rptr. 407.)

B. *The Trial Court Properly Entered Summary Judgment Against All Defendants.*

1. *Standard of Review*

Summary judgment in favor of a defendant is proper if (1) the defendant shows that one or more elements of a cause of action cannot be established or there is a complete defense to it; and (2) the plaintiff fails to meet his or her burden of showing the existence of a triable issue of material fact. (Code Civ. Proc., n2 § 437c, subd. (p)(2).) We undertake de novo review of the trial court's decision to grant summary judgment. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

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n2 Unless otherwise noted, all further statutory references are to the Code of Civil Procedure.

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2. *General Principles*

The issue in the wrongful death [*11] causes against respondents is whether they breached the standard of care required under the circumstances. Appellants' primary challenge concerns the expert declarations submitted in support of each moving defendant. The standard of care against which a medical provider's actions is measured is a matter peculiarly within the knowledge of experts and can only be established by their testimony, unless the conduct called for under the circumstances is within the common knowledge of laypersons. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.) Except where the common knowledge exception applies, proof of breach of the standard of care by a medical provider requires the testimony of a medical expert, as does proof that such negligence caused the injury. (*Keen v. Prisinzano* (1972) 23 Cal. App. 3d 275, 279, 100 Cal. Rptr. 82.)

"The 'common knowledge' exception is

principally limited to situations in which the plaintiff can invoke the doctrine of res ipsa loquitur, i.e., when a layperson 'is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily [*12] would have followed if due care had been exercised.' [Citations.] The classic example, of course, is the X-ray revealing a scalpel left in the patient's body following surgery.' [Citation.]" (*Flowers v. Torrance Memorial Hospital Medical Center, supra*, 8 Cal.4th at p. 1001, fn. omitted.)

In this case, the medical facts are complex and not amenable to comprehension by a layperson. This is not a situation where the medical procedure is so simple, routine and widely known that negligence may be inferred by laypersons from their common knowledge. (See *Cobbs v. Grant* (1972) 8 Cal.3d 229, 238, 104 Cal. Rptr. 505.)

Nonetheless, citing *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 210 Cal. Rptr. 762, appellants claim that a person must be

designated as an expert if he or she discloses sufficient knowledge of the subject to entitle the opinion to go to the jury. They attempted to designate Linh Dao, a bioengineer, as an expert "regarding standard practice, causation, and damages . . . ." *Mann* does not assist them. There, the plaintiffs' expert was a surgeon, not a radiologist, and the medical issue involved the analysis of X-rays and [*13] the standard of care for radiologists. (*Id.* at p. 38.) Our Supreme Court held that he was competent to testify to the standard of care: " 'While a layman may not testify to a fact which he has learned only by reading a medical book, there is no question that a professional physician may rely upon medical texts as the basis for his testimony. [Citations.] . . . [A] medical doctor possesses a professional experience which gives him a knowledge of the trustworthy authorities and the proper sources of information, as well as a degree of personal observation of the general subject enabling him to estimate the plausibility of the views expressed.' " (*Id.* at p. 37.)

Linh Dao is not a doctor or nurse, nor did she receive training as a doctor or nurse. That she has a bachelor of science degree in interdisciplinary engineering and on her own, since her mother's illness, researched MDS and related issues, did not qualify her as an expert on the practice standards in the field of medical and nursing care. (See *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal. App. 3d 1, 67, 221 Cal. Rptr. 171.) The trial court was well within [*14] its discretion to conclude that Ms. Dao did not have the training, education or experience to render expert testimony on the applicable standard of care for physicians or nurses. (*Thai v. Stang* (1989) 214 Cal. App. 3d 1264, 1276, 263 Cal. Rptr. 202.)

3. *Analysis*

We now address the specific issues concerning each defendant.

a. *Dr. Sadiq*

Appellants attack the declaration of Dr. Welborn as "full of lies" and not in compliance with section 2015.5 because the

form of declaration did not include the phrase "under penalty of perjury." Dr. Welborn's declaration ends with the following: "I declare that the foregoing is true and correct of my own personal knowledge, and according to the laws of the State of California, and that I would similarly testify if called as a witness at the trial of this matter. [P] Executed this 26[th] day of August, 2004 at Davis, California."

Our summary judgment statute authorizes the admission of hearsay evidence as the sole or primary evidence of relevant facts when submitted by declaration or affidavit to support or oppose such motions. (§ 437c, subd. (b).) An affidavit is "a written declaration under oath" (§ 2003) "taken [*15] before any officer authorized to administer oaths" (§ 2012). Affidavits have been in use in California since 1882, and the oath-taking procedure is regarded as assisting in prevention of perjury. (*Kulshrestha v. First Union Commerical Corp.* (2004) 33 Cal.4th 601, 609 (*Kulshrestha*).)

With the enactment of section 2015.5 in 1957, the Legislature authorized declarations under penalty of perjury as an alternative to affidavits. (Stats. 1957, ch. 1612, § 1, p. 2959.) As defined in section 2015.5, a declaration is a writing, signed, dated and certified as true under penalty of perjury. Further, the declaration must either reveal a place of execution within this state or indicate that it is made "under the laws of the State of California." (*Ibid.*) "Declarations serve as a more streamlined means of ensuring that the witness understands 'the grave responsibility he has assumed with respect to the truth[].' " (*Kulshrestha, supra*, 33 Cal.4th at p. 609.) Moreover, section 2015.5 endeavors to improve the reliability of all declarations by disclosing the sanction for dishonesty. Thus it requires some acknowledgment within the body of the declaration [*16] that perjured statements might prompt prosecution under California law. (*Id.* at p. 606.)

Dr. Sadiq argues that we should excuse the missing "under penalty of perjury" language, insisting that the declaration substantially

complies with section 2015.5. Citing the plain language of the statute, *Kulshrestha* rejected a substantial compliance claim where the declaration indicated the place of execution in another state, but did not reference California laws. (*Kulshrestha, supra,* 33 Cal.4th at pp. 610-611.) Here, the plain language requires that the declarant avow the truth of the statements "under penalty of perjury." (§ 2015.5.) The sanction for dishonesty-prosecution under our perjury laws-only comes into play where the declaration is "under penalty of perjury." Specifically, "every person who testifies, declares, deposes, or certifies *under penalty of perjury* in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California *under penalty of perjury* and willfully states as true any material matter which he or she knows to be false, is guilty of perjury." (Pen. Code, § 118 [*17] , subd. (a), italics added.)

Nonetheless, although appellants objected to Dr. Welborn's declaration "as wholly conclusory, based on hearsay lacking

foundation and at least unqualified with respect to bone marrow transplantation," they said nothing about the form of the declaration. Evidentiary objections not lodged during the summary judgment proceedings are waived. (§ 437c, subd. (b)(5).) Moreover, we will not reverse a judgment by reason of erroneous admission of evidence unless the record demonstrates a timely objection "so stated as to make clear the specific ground of the objection . . . ." (Evid. Code, § 353, subd. (a).) Appellants have waived objection to this obvious error.

Their related argument that the declaration was "full of lies" is unsupported by any rational argument.

b. *Dr. Cheng*

Appellants first maintain that Dr. Cheng's exchange of expert witness information was untimely by one day. Whether or not the statutory exchange was timely, such exchange was in furtherance of a trial on the matter and had no bearing on submission of the expert's declaration in support of summary judgment.

Therefore, this argument is irrelevant. Additionally, [*18] appellants complain that Dr. Smith is an oncologist, and that his declaration is silent as to whether he completed a fellowship in hematology. Yet, the declaration states Dr. Smith currently is an assistant clinical professor of medicine in the division of hematology/oncology at the University of California, San Francisco and that he completed a fellowship there in hematology and oncology in 1995. Appellants also take issue with the substance of Dr. Smith's opinion, claiming he did not demonstrate sufficient knowledge to opine on the appropriate standard of care. But again, they failed to oppose it with admissible expert opinion. The trial court properly found him qualified to render an expert opinion.

Dr. Smith reviewed the course of treatment under Dr. Cheng, the decedent's diagnosis, medical conditions and prospects. He concluded that no act or omission on the part of Dr. Cheng contributed to decedent's death and that Dr. Cheng provided her with appropriate care that met the applicable

standard in all respects. Once diagnosed with MDS, and without undergoing a bone marrow transplant within the first two years of diagnosis, the decedent's chances of surviving another five years [*19] were significantly less than 50 percent. Decedent's organs were not in the condition required to withstand bone marrow replacement and in any event, in 2001 Stanford University Medical Center had determined that she was not a transplant candidate because she did not have an identical donor. Dr. Smith's unopposed testimony was sufficient to sustain summary judgment in Dr. Cheng's favor.

c. *Washington Township*

Appellants contend that the declaration of Nurse Cecilia Cadet in support of Washington Township's motion for summary judgment was "patently false." Specifically, they claim Nurse Cadet lied because her statement that "[t]he medical records reflect that the patient was administered antibiotics for her infection throughout her hospitalization" conflicts with a medical record indicating that at some point, because of the given circumstances,

"antibiotics were stopped." Appellants reason that this contradiction shows the nurse did not review the medical records as stated in her declaration. However, this assertion involves interpretation of the medical records, what the nurses did, and whether the conduct was within the appropriate standard of care. Appellants cannot go down [*20] this path because they did not provide expert testimony. Moreover, as a general matter, summary judgment will not be denied a party otherwise entitled thereto on credibility grounds or want of cross-examination of those furnishing declarations. (§ 437c, subd. (e).)

III. DISPOSITION

The summary judgment in favor of respondents is affirmed.

Reardon, J.

We concur:
Ruvolo, P.J.
Rivera, J.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Alameda County Courthouse

No. 2002065566

Dao, Plaintiff/Petitioner(s)

v.

Washington Township Healthcare District , Defendant/Respondent(s)

(Abbreviated Title)

Order

Motion for Summary Judgment Granted

The Motion for Summary Judgment was set for hearing on 2/10/2005 at 02:00PM in Department 31 before the Honorable Steven

A. Brick. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The Motion for Summary Judgment by Defendant Ahmed Sadiq is GRANTED. The undisputed facts established that Defendant did not breach the applicable standard of care or cause decedent's death. See Defendant's Facts No. 1-18, Plaintiffs' Response, and the evidence cited in support of and in opposition thereto.

The Court notes that the applicable standard of care in a medical malpractice action can only be established by expert testimony. See Landeros v. Flood (1976) 17 Cal.3d 399, 410. Nothing in the Declaration of Plaintiff Linh Dao establishes that she has the training, education, or experience to give expert testimony as to the applicable standard of care

for physicians or nurses. See also the deposition of transcript of Linh Dao, submitted with the Reply of Defendant Ahmed Sadiq, at pages 185:6-14 and 191:3-15, where Ms. Dao specifically denies being a medical expert.

To the extent that Plaintiffs' discussion of the Declaration of Jeanna Welborn on pages 4-5 of the Opposition is intended to be evidentiary objection, Plaintiffs' evidentiary objections to the Welborn Declaration are OVERRULED in their entirety.

Defendant Ahmed Sadiq is DISMISSED from this action.

All Future hearing dates, including the 3/18/05 trial date, are VACATED.

Defendants to prepare judgment.

Dated: 2/10/05

Judge Steven A. Brick

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Alameda County Courthouse

No. 2002065566

Dao, Plaintiff/Petitioner(s)

v.

Washington Township Healthcare District , Defendant/Respondent(s)

(Abbreviated Title)

Order

Motion for Summary Judgment Granted

The Motion for Summary Judgment was set for hearing on 2/10/2005 at 02:00PM in Department 31 before the Honorable Steven A. Brick. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The Motion for Summary Judgment by Defendant David Cheng is GRANTED. The undisputed facts established that Defendant did not breach the applicable standard of care or cause decedent's death. See Defendant's Facts No. 7-13, Plaintiffs' Response, and the evidence cited in support of and in opposition thereto.

The Court notes that the applicable standard of care in a medical malpractice action can only be established by expert testimony. See Landeros v. Flood (1976) 17 Cal.3d 399, 410. Nothing in the Declaration of Plaintiff Linh Dao establishes that she has the training, education, or experience to give expert testimony as to the applicable standard of care for physicians or nurses. See also the deposition of transcript of Linh Dao, submitted with the Reply of Defendant Ahmed Sadiq, at pages 185:6-14 and 191:3-15, where Ms. Dao specifically denies being a medical expert.

To the extent that Plaintiffs' discussion of the Declaration of Dr. Garrett Smith on pages 2-4 of the Opposition is intended to be evidentiary objection, Plaintiffs' evidentiary objections to the Smith Declaration are OVERRULED in their entirety. The Court notes that "false and misleading" is not an appropriate evidentiary objection.

The Court notes, however, that Defendant failed to properly authenticate decedent's medical records, so the Court did not consider any of the evidence attached as Exhibits B-F to the Declaration of Christine Meade.

Defendant David Cheng is DISMISSED from this action.

All Future hearing dates, including the 3/18/05 trial date, are VACATED.

Defendants to prepare judgments.

Dated: 2/10/05

Judge Steven A. Brick

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Alameda County Courthouse

No. 2002065566

Dao, Plaintiff/Petitioner(s)

v.

Washington Township Healthcare District , Defendant/Respondent(s)

(Abbreviated Title)

Order

Motion for Summary Judgment Granted

The Motion for Summary Judgment was set for hearing on 2/10/2005 at 02:00PM in Department 31 before the Honorable Steven A. Brick. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The Motion for Summary Judgment by Defendant Washington Township Healthcare District is GRANTED. The undisputed facts established that Defendant did not breach the applicable standard of care or cause decedent's death. See Defendant's Facts No. 15-16, Plaintiffs' Response, and the evidence cited in support of and in opposition thereto.

The Court notes that the applicable standard of care in a medical malpractice action can only be established by expert testimony. See Landeros v. Flood (1976) 17 Cal.3d 399, 410. Nothing in the Declaration of Plaintiff Linh Dao establishes that she has the training, education, or experience to give expert testimony as to the applicable standard of care for physicians or nurses. See also the deposition of transcript of Linh Dao, submitted with the Reply of Defendant Ahmed Sadiq, at pages 185:6-14 and 191:3-15, where Ms. Dao specifically denies being a medical expert.

To the extent that Plaintiffs' discussion of the

Declaration of Cecilia Cadet on pages 5-6 of the Opposition is intended to be evidentiary objection, Plaintiffs' evidentiary objections to the Smith Declaration are OVERRULED in their entirety. The Court notes that "false and misleading" is not an appropriate evidentiary objection.

The Court further notes, however, that Defendant failed to properly authenticate decedent's medical records, so the Court did not consider any of the evidence attached as Exhibit A to the Declaration of W. David Walker.

Defendant Washington Township Healthcare District is DISMISSED from this action.

All Future hearing dates, including the 3/18/05 trial date, are VACATED.

Defendants to prepare proposed judgment.

Dated: 2/10/05
Judge Steven A. Brick